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Supreme Court, U.S.
FILED

No.

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

ARETHA CHAPMAN
ZENA PARKER
JOYCE SHELTON
GRACE PAPPAS
LISA GREGORY
CAROLYN BOLLING

Petitioners,

v.

RICHARD DANZIG, Secretary of the Navy

Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 9, 2001

61 pp

QUESTION PRESENTED

1. Whether the District Court erred in ruling that female employees do not have a direct cause of action under the Constitution against their federal employer to challenge the denial of their rights under the Constitution to petition in redress of grievances and to challenge the violation of their rights to due process and equal protection of law when admittedly the Agency has destroyed such employees' EEO documents, intimidated and threatened employees' EEO witnesses, retaliated against employees' EEO counselor, provided employees false and misleading EEO advice and counseling, and engaged in other improper conduct designed to delay and frustrate the investigation and resolution of female employees' EEO complaints?

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UNITED STATES CODES

28 U.S.C. § 1254(1) 2

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

ARETHA CHAPMAN
ZENA PARKER
JOYCE SHELTON
GRACE PAPPAS
LISA GREGORY
CAROLYN BOLLING

Petitioners,

v.

RICHARD DANZIG, Secretary of the Navy

Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners Aretha Chapman, Zena Parker, Joyce Shelton, Grace Pappas, Lisa Gregory and Carolyn Bolling respectfully pray that a writ of certiorari issue to review the

judgment of the United States Court of Appeals For The Fourth Circuit entered in this proceeding on October 11, 2000.

OPINIONS BELOW

The judgment of the United States Court of Appeals For The Fourth Circuit is unpublished and appears in Appendix A hereto. The final order or judgment of the United States District Court For The Eastern District of Virginia dismissing Petitioner's Complaint appears in Appendix B. The transcript of the District Court's dismissal ruling from the bench appears in Appendix C.

JURISDICTION

The final judgment of the United States Court of Appeals For The Fourth Circuit was entered on October 11, 2000 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First, Fifth and Seventh Amendments to the Constitution of the United States provide a right of action in federal court to litigants, such as Petitioners, for violation by their federal employer of their rights to petition in redress of grievances, to due process and equal protection of the law.

STATEMENT OF THE CASE

The present case arose in the U.S. District Court for the Eastern District of Virginia as a Complaint for permanent injunctive relief to prevent further violations of Petitioners' rights under the Constitution. The motion for preliminary injunction was denied. Petitioners were all federal employees who had filed EEO complaints with the Department of the Navy alleging violations of their civil rights. Discovery was propounded by the Petitioners but was not responded to by the Agency. Instead, Agency moved to dismiss under Rule 12(b)(6). The district court granted Agency's motion and the

dismissal was affirmed on appeal to the Fourth Circuit without oral argument.

STATEMENT OF THE FACTS

Petitioners Aretha Chapman, Zena Parker, Joyce Shelton, Grace Pappas, Lisa Gregory and Carolyn Bolling are all non-white female employees of the Department of the Navy who have filed administrative complaints of discrimination with their agency pursuant to 29 C.F.R. 1614, et seq. The Agency responsible for processing the EEO complaints of the Petitioners was NAVSEA--the Naval Sea Systems Command, located in Northern Virginia. Although each of the Petitioners alleged distinct acts of discrimination on the basis of sex, race, disability and other factors, each complaint was to be processed by the same NAVSEA EEO officials. By various unlawful means, NAVSEA deliberately failed to process the Petitioners' complaints in accordance with the rules and regulations of the Agency or of 29 C.F.R. 1614, et seq.

The Petitioners alleged untimely delays in initiating investigations, failure or refusal to investigate, destruction of documents, intimidation of witnesses by NAVSEA EEO officials, retaliation against EEO investigators, retaliation against the Petitionerss, false affidavits being produced by NAVSEA EEO officials, personal threats being made by NAVSEA EEO officials and others connected to the EEO investigative process, missed deadlines, false and misleading advice and counseling by EEO officials, interference in EEO investigations by military and civilian management officials, demands to repeat counseling for the same offense, etc. Petitioners' EEO complaints were not just ignored, they were sabotaged by the very persons charged with enforcing the EEO regulations imposed upon the Agency by Congress.

In an effort to obtain relief from the refusal and deliberate failure of the Agency to properly investigate their EEO complaints, Petitioners filed suit in U.S. District Court for the Eastern District of Virginia, alleging violation of their

constitutional rights to Due Process and Equal Protection of the laws. Specifically, Petitioners alleged that their ability to achieve full redress for their EEO complaints was being unfairly jeopardized by the deliberate refusal of NAVSEA to process and investigate their complaints.

For the purposes of its motion to dismiss, Agency admitted as true all of Petitioners' allegations of wrongdoings against the Agency. The Court below denied Petitioners' motion for preliminary injunction. Other than the affidavits filed with the complaint and motion for preliminary injunction, no witness testimony was allowed. Petitioners sought discovery from Agency to demonstrate the substantial support for their allegations. Subsequently, Agency filed a Rule 12 Motion to Dismiss and refused to respond to Petitioners' discovery requests. Agency argued that, even if it did not properly enforce Petitioners' rights under the applicable EEO regulations, Petitioners were not deprived of their right to seek a full remedy in federal court after the expiration of 180 days. Petitioners

averred that they were in fact deprived of a full remedy by the failure of the Agency to adhere to the administrative procedures imposed upon it by Congress. Petitioners noted an appeal following the U.S. District Court's decision to grant Agency's motion to dismiss for failure to state a claim and lack of jurisdiction. Without the benefit of oral argument, the Fourth Circuit affirmed the District Court's dismissal.

REASONS FOR GRANTING THE WRIT

It was constitutional error for the District Court to find that minority female employees do not have a direct cause of action under the Constitution against their federal employer to challenge the violation of their rights to petition in redress of grievances and their rights to due process and equal protection of law when admittedly the Agency has destroyed employees' EEO documents, intimidated and threatened employees' EEO witnesses, retaliated against employees' EEO counselor, provided employees false and misleading EEO advice and counseling, and engaged in other unlawful conduct designed to

delay and frustrate the investigation and resolution of female employees' EEO complaints.

The Agency's refusal and deliberate failure to process, investigate and properly resolve Petitioners' EEO complaints against their federal employer deprived Petitioners of their substantive rights under the Constitution to equal protection of the law, due process and their right to petition for redress under the various civil rights statutes enacted by Congress. Petitioners, as federal employees, were required to proceed through the administrative process and seek redress there before litigating their grievances and EEO complaints in federal court. The Court below erred by holding that Petitioners had no Constitutional claims and that they were not deprived of any substantive statutory or Constitutional right by the failure of their agency to enforce their statutory rights to administrative due process. Contrary to the lower court's ruling, Petitioners were deprived of, *inter alia*, the opportunity to collect and preserve valuable evidence that could be used in their

subsequent federal litigation, to a no cost administrative remedy, to a rapid resolution of their complaints, to informal resolutions of their complaints, to valuable counseling that would or could have the effect of eliminating unnecessary litigation and harassment, to the psychological benefits of a workplace free of unlawful employment discrimination.

The mere fact that Petitioners are entitled to file a federal EEO lawsuit in spite of the inaction of the Agency at the administrative level does not compensate the Petitioners for the loss of their statutory administrative rights conferred by Congress. One of the deficiencies in the EEO process at NAVSEA cited by the Petitioners was the deliberate failure of the EEO officials and counselors at NAVSEA to inform the Petitioners that they had a right to file a lawsuit after 180 days. By deliberately failing and refusing to advise the Petitioners of their rights under the EEO laws and regulations, Petitioners were effectively denied their rights under the law. The administrative EEO counseling process is an important right and

statutorily conferred privilege in and of itself that must be properly enforced if the remedial scheme fashioned by Congress to eliminate workplace discrimination is to have any chance to function. It is a fundamental right that cannot be taken away without the due process of law. Its deliberate desecration by the Agency entitled Petitioners to relief that will fix this broken system.

This writ is necessary in order to determine whether the trial court's granting of Agency's motion to dismiss was erroneous as a matter of law and a denial of constitutional rights of Petitioners.

It is now well settled that a district court should dismiss a complaint pursuant to Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). All factual doubts must be resolved and all inferences made in favor of the plaintiff. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a district court must convert a motion to dismiss to a motion for summary judgment if "matters outside the pleadings are presented to and not excluded by the Court." F.R.C.P. 12 (b).

PETITIONERS MAY PURSUE A DIRECT CAUSE OF ACTION UNDER THE CONSTITUTION AGAINST A FEDERAL AGENCY FOR VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

Petitioners have alleged violations of their rights under the First and Fifth Amendments to the Constitution and have alleged ultra vires action by the Agency. The Complaint specifically alleges unlawful and intentional acts of retaliation, intimidation of EEO counselors and complainants, destruction of documents gathered as part of EEO investigations and other unlawful tactics engaged in by the Agency to unlawfully defeat Petitioners' rights to due process, equal protection and to petition the Government for redress of grievances. Petitioners have sufficiently plead their cause of action to implicate a claim

under the Constitution. Whiteacre v. Davey, 890 F.2d 1168 (D.C.Cir. 1989).

A cause of action and remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. Davis v. Passman, 442 U.S. 228(1979). The Constitution provides a remedy in the absence of express statutory action by Congress. Bolling v. Sharpe, 347 U.S. 497 (1954)(Fifth Amendment forbids racial discrimination by the federal government). Petitioners have specifically alleged a violation of their Fifth Amendment rights to Due Process in this action and have submitted ample evidence in support thereof. While the various remedial schemes established by Congress to enforce non-discrimination in employment are supposed to provide a remedy for the Petitioners, this is an extraordinary situation where the Agency is specifically and deliberately acting to prevent Petitioners from even asserting their rights under those elaborate remedial schemes. This misconduct by the Agency constitutes a denial of due process and the right to

petition the government for redress of grievances by the Petitioners and required court intervention. There is no statutory remedy when the Agency that is charged with enforcing the statute refuses to enforce the statute. This is a violation of Petitioners' right to protect their interests as persons who have filed EEO charges. Under the Constitution, the Agency must provide an effective means to petition the government and must provide equal protection to those who invoke the EEO process as a means of exercising their statutory rights. Cf. Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944)(holding that the law "imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interest of a member of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates").

Petitioners are not seeking to create a new remedy, they are only seeking enforcement of the remedies that they are supposed to have under the law. However, Agency has

corrupted the process in such a manner as to prevent *the possibility* of any relief. Agency has improperly destroyed documents relating to investigations, intimidated at least one EEO counselor, unlawfully insisted that Petitioners continuously repeat counseling and engaged in other unlawful tactics in order to refuse to start and deliberately fail to complete EEO investigations. To make matters worse, since, this lawsuit was filed, Agency has rewarded the malefactors by elevating Ms. Marcia Thurman, one of the individual supervisors accused of discrimination and other unlawful activities by some Petitioners, to a position where she is in charge of the EEO process from start to finish at NAVSEA. Ms. Thurman can now remove any EEO counselor who dares to investigate charges against her. The EEO office at NAVSEA is broken and corrupt and Petitioners cannot expect any adequate due process when the "fox is guarding the chicken coop". Agency is also engaged in a new unlawful process of selectively terminating Petitioners

because they have opposed and protested unlawful employment discrimination.

The misconduct that Petitioners are complaining of in this constitutional litigation is not covered by Title VII. The underlying complaints of employment discrimination are not a part of this litigation. Instead, this litigation is about a federal agency deliberately and recklessly violating the rights of its female employees to petition for redress of grievances, to due process and to equal protection of the law. Petitioners maintain that part of their liberties as citizens of the United States is to be free of unlawful discrimination on the basis of their sex and/or race. Petitioners further maintain that Congress has provided a statutory scheme under Title VII that they can invoke in order to protect their rights to anti-discrimination on the basis of sex/race. Petitioners maintain that whenever the Agency, as in this case, deliberately violate their rights to invoke, and effectively use, the statutory scheme that Congress has established, then their rights to petition the government for

redress of grievances, for due process and equal protection of the law has been violated. In other words, their rights to a fair EEO process have been taken away without providing fair procedures.

THE AGENCY HAS ESTABLISHED AN EEO TREADMILL THAT IMPAIRS PETITIONERS RIGHTS

The Agency has effectively turned Petitioners' statutory remedy under Title VII into an illusion. Petitioners' administrative remedy assumes that the Agency is obeying the law and that the Petitioners have an avenue of redress outside of the administrative process, even if the Agency continues to disobey the law. The fallacy in this argument is that the Agency has made it impossible for the Petitioners to proceed to a judicial remedy under Title VII because of the corrupted EEO process that has been extrajudicially created by the Agency. Petitioners cannot escape from the EEO process because the Agency has continuously and illegally ordered Petitioners to repeat the EEO counseling process. Petitioners are on a virtual treadmill of

"process" that succeeds in exhausting them, but gets them nowhere. By doing so, Petitioners will never get a right to sue letter or otherwise complete the administrative pre-requisites to filing suit. Even when ordered by the Court to permit Petitioners to proceed forward, the Agency has so impaired Petitioners' cases by its destruction of relevant documents and intimidation of witnesses that Petitioners' day in court will be a mere formality.

It was Agency's position below that the Petitioners "have a right to have their employment grievances heard, but they have no right to tell the agency how to go about the process of dealing with their grievances". This position erroneous and misleading and was adopted by the District Court below. Petitioners were not trying to tell the agency how to investigate their claims. Rather, Petitioners are insisting that the Agency follow in good faith *the law and its own regulations*. Federal agencies have no right to deviate with impunity from their own published regulations. See, Peters v. Hobby, 349 U.S.

331 (1955). The only mechanism to correct government malfeasance or non-feasance in its enforcement of its own regulations, in the absence of express legislative action, is the Constitution. There is no express statutory remedy against an Agency for failure to properly administer its EEO programs. The only remedy is found in the Constitution. Even the Executive Branch must yield to the mandates of judicial interpretation of the Constitution. See, Nixon v. United States, 418 U.S. 683 (1974).

Although the underlying basis of this case concerns discrimination claims, the real question is whether or not the Agency can continue to ignore its own administrative regulations and effectively deprive the Petitioners of due process and equal protection of the law. One of the remedies available to the District Court for fixing the broken EEO process that existed at Agency was the appointment of a Special Master to enforce the injunctive relief they are seeking from the Court. It did not mean that a Special Master would effectively operate a

segment of an Executive Branch agency; rather, it means that an arm of the Executive Branch cannot ignore the Constitution. The Constitution tolerates neither sophisticated nor simpleminded modes of discrimination. Lane v. Wilson, 307 U.S. 268 (1939). Such relief is not unheard of. This court is also free to impose equitable relief by means short of the appointment of a Special Master, such as by its own orders and oversight. See, Lane v. Pena, 518 U.S. 187 (1996)(U.S. District Court orders reinstatement of midshipman at U.S. Merchant Marine Academy pursuant to Rehabilitation Act of 1973 due to discrimination by Executive Agency).

The District Court's ruling implied that this issue is nonjusticiable and that the Executive Branch is above the law. It is not. Nixon v. United States, supra. The separation of powers doctrine does not prevent the Judicial Branch from issuing equitable relief to prevent Constitutional violations by the Executive Branch. Marbury v. Madison, 5 U.S. 137 (1803). In our system of checks and balances, preservation of

Constitutional liberties and checking the power of the Executive Branch is one of the highest callings of the Judicial Branch. The Supreme Court has even taken the Legislative Branch to task when its actions against individuals threaten individual Constitutional rights. Davis v. Passman, 442 U.S. 228 (1979) (Right of individual to sue Congressman for sex discrimination in absence of Title VII statutory protection upheld under Fifth Amendment right to due process and equal protection).

To legally justify its misconduct in this case, Agency had to rely upon case law from an America at a different time and place in history, prior even to Reconstruction, a time when certain segments of the population had no rights that other segments were "bound to respect". See, Dred Scott v. Sandford, 5 U.S. 137 (1803) (Taney, C.J.). Unlike that unfortunate time in our country's history, the policy considerations that the current judiciary must recognize regarding this case is the Civil Rights Act of 1991, not Antebellum anachronisms that are offensive even to Marbury v. Madison, 5 U.S. 137 (1803).

Agency's misconduct and the District Court's ruling should not be allowed to drag this country back into an era that did not respect the Constitution, the rule of law, civil liberties, caused a bloody civil war and a wrenching civil rights movement. We live in a different world than the one envisioned by the Agency in its unconstitutional behavior. The Agency's behavior in this case is illegal and unconstitutional and this court must hold the Agency accountable to our constitutional legal order by allowing Petitioners to be heard on the merits of their constitutional claims.

Particularly in the area of civil rights, the Judicial Branch has actively enforced the U.S. Constitution to remedy the failures of the Legislative and Executive Branches of government. Brown v. Board of Education of Topeka, KS, 347 U.S. 483 (1954)(racial segregation in public school system unconstitutional-desegration ordered); Gomillion v. Lightfoot, 364 U.S. 339 (1960)(federal court intervention in racial gerrymandering by Alabama legislature. Violation of Fifteenth

Amendment not a political question, but a Constitutional issue); Bolling v. Sharpe, 347 U.S. 497 (1954)(Fifth Amendment forbids racial discrimination by the federal government); Lane v. Pena, 518 U.S. 187 (1996)(U.S. District Court orders reinstatement of midshipman to U.S. Merchant Marine Academy pursuant to Rehabilitation Act of 1973 due to discrimination by Executive Agency). See also, Bush v. Gore, ___U.S.___, No. 00-949 (Dec. 12, 2000) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront"). Id at p. 13.

No branch of government is above judicial review and the extent of the Judicial Branch's power of judicial review is determined solely by the Judicial Branch, not the Executive Branch, i.e., the Agency. The only limit on judicial review is by way of Constitutional amendment. Accordingly, there is no Constitutional amendment that limits this court's powers to

review the horrendous due process crisis created by Agency's unlawful behavior in failing to process Petitioners' EEO claims.

Even if the appointment of a special master is beyond the authority of this Court, that was no basis for dismissal of Petitioners' Complaint. The remedy for Petitioners' Complaint is a matter that can be tailored to suit the needs of the Petitioners and the Court following a determination of liability. It may turn out that there is no further need for Court oversight of this matter following a trial on the merits. Monetary damages may be appropriate. Injunctive relief of some other form short of the appointment of a special master may be appropriate. Nominal damages may be appropriate. At the stage that it was dismissed by the District Court, it was too early to tell. However, based on the admissions of wrongdoings made by Agency in its motion to dismiss, the District Court was on notice that the Agency was flaunting the Constitution. Under these circumstances, Petitioners were entitled to some form of

injunctive relief to stop Agency and the Court was empowered to act. See, Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987).

PETITIONERS DID NOT HAVE A FULL AND FAIR OPPORTUNITY TO CONDUCT DISCOVERY IN ORDER TO PROPERLY OPPOSE THE RULE 12(B)(6) MOTION TO DISMISS

Petitioner never had a full and fair opportunity to develop the record in order that the court could have determined the merits of Petitioners' constitutional claims. Agency's premature motion was filed after Petitioners' sought discovery in order to demonstrate that Agency had acted -- and was still acting -- in violation of Petitioners' constitutional rights. Agency's motion should have been denied because it was premature and raised issues of fact that could not be adequately resolved without allowing Petitioners an opportunity to conduct discovery.

It must be further noted that Agency has admitted that Petitioners have a substantive constitutional right to the equal protection of the law under the Fifth Amendment to the United

States Constitution. However, Agency shamefully asserts that even if the Navy's "EEO process is broken", there is no independent cause of action for the intentional and willful mishandling of "federal employees' discrimination complaints" under the U.S. Constitution. Moreover, Agency blatantly challenges the authority of the District Court by stating that neither this Court "nor any official answerable to the Court ... has authority to conduct the business of an executive agency on an ongoing basis as if an agency employee." Agency's brazen assertion overlooks the important fact that practicing unlawful discrimination and failing to follow Congress' mandate to investigate and eliminate discrimination is not conducting the business of an executive agency but, rather is conducting the business of individuals intent on violating the rights of persons such as Petitioners who were looking to the Courts for protection of individual rights in the conduct of executive business. In other words, the fact that there is an EEO process in place for the benefit of Petitioners as a protection against

unlawful conduct by executive branch officials requires this court to determine if the persons who are to benefit from the process rights are being violated. Cf. Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

Because of the Agency's admissions in this case, the weight of the evidence only allows for the scale to come down in one way. It must come down in favor of Petitioners' constitutional claims obtaining the judicial attention that they deserved. This is the process that Petitioners are due.

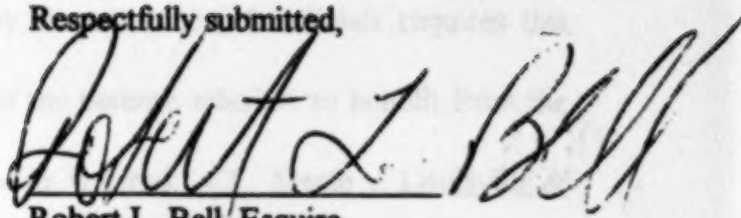
This was not a case that should have been dismissed by a judge. Petitioners were seeking a jury trial. Petitioners have been denied their constitutional right to a jury trial. Cf. Beacon Theaters, Inc. v. Westover, 359 U.S. 500(1959).

CONCLUSION

For these foregoing reasons, a writ of certiorari should be issued to review the final Judgment of the United States Court of Appeals For The Fourth Circuit dated October 11, 2000.

APPENDICES

Respectfully submitted,



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APPENDICES

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 00-1348

ARETHA CHAPMAN; TERESA ELLIOT; HESTIA G. PAPPAS; CAROLYN BOLLING; ZENA R. PARKER; JOYCE SHELTON; LISA C. GREGORY,

Plaintiffs - Appellants,

versus

RICHARD DANZIG, SECRETARY OF THE NAVY

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, District Judge. (CA-99-1494-A)

Submitted: September 29, 2000 **Decided: October 11, 2000**

Before WIDENER, MOTZ, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Robert L. Bell, C. Vaughn Adams, BELL & ADAMS, Washington, D.C., for Appellants. Arthur Erwin Peabody, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Plaintiffs appeal the dismissal of their suit alleging constitutional violations by the Equal Employment Opportunity Office of the Naval Sea Systems Command. We have reviewed the record and the district's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Chapman v. Danzig, N. CA-99-1494-A (E.D. Va. Feb. 24, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARETHA CHAPMAN, et al.,	)	**FILE**
	)	**FEB 18**
	)	CLERK US DISTRICT COURT
Plaintiffs,	)	ALEXANDRIA, VIRGINIA
	)	
v.	)	**Civil Action No. 99-1494-A**
	)	
RICHARD DANZIG, Secretary	)	
United States Navy	)	
	)	
Defendants.	)	

ORDER

The matter came before the Court on defendant's motion to dismiss a failure to state a claim pursuant to Rule 12(b)(6), Fed.R.Civ.P.

For the reasons stated from the Bench, the motion is hereby **GRANTED**. As this order disposes of all of plaintiff's claims, this matter shall be placed among the ended causes.

The Clerk is directed to send a copy of this Order to all counsel of record.

[signed]
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
February 18, 2000

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARETHA CHAPMAN, et al.,	)	
	)	
Plainitffs,	)	
	)	
v.	)	CIVIL ACTION
	)	
RICHARD DANZIG, et al.,	)	99-1494-A
	)	
Defendants.	)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

Friday, February 18, 2000

- - -

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: DONALD ALLEN, ESQ.
ROBERT BELL, ESQ.

For the Plaintiff

HELEN FAHIE, UNITED STATES ATTORNEY
BY: ARTHUR PEABODY, AUSA
NANETTE OPPENHEIMER, Naval Systems

For the Defendants

- - -

MICHAEL A. RODRIQUEZ, RPR/CM/RMR
Official Court Reporter
USDC, Eastern District of Virginia
Alexandria Division

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ARGUMENT BY THE PLAINTIFFS

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RULING BY THE COURT

(Court recessed)

PROCEEDINGS

(Court called to order at 10:55 a.m. in Chapman v. Danzig)

THE CLERK: Civil Action Number 9-1494-A, Aretha Chapman versus Richard Danzig.

Counsel, please note your appearances.

THE COURT: All right, who is here on behalf of the plaintiff?

ATTORNEY ALLEN: Good morning, your Honor. Donald Allen, local counsel. Mr. Bell is the lead counsel.

ATTORNEY BELL: Good morning, your Honor.

THE COURT: Good morning, Mr. Allen. Good morning, Mr. Bell.

Who is here on behalf of the government?

ATTORNEY PEABODY: Good morning, your Honor. Arthur Peabody, assistant United States attorney. With me, I have from the Naval C Systems Command, Nanette Oppenheimer.

THE COURT: Who will argue today, Mr. Peabody?

ATTORNEY PEABODY: I will, your Honor.

THE COURT: It's your motion. I have read all of the submissions in the matter, so you don't have to repeat everything, but you should take this opportunity to put your best, and what you believe to be dispositive, foot forward, and then I will give Mr. Bell an opportunity to do the same.

ATTORNEY PEABODY: Yes, your Honor.

ARGUMENT BY THE DEFENDANT

ATTORNEY PEABODY: This is a case where the plaintiffs are attempting to create a constitutionally based cause of action to challenge what they believe to be - - and we have acknowledged - - certain defects in the processing of their EEO complaints.

Our position, I believe firmly based on the case law, is that the de novo, the right of de novo review in Federal Court or the EEOC following 180 days after the filing of a formal complaint, fully protects their constitutionally protected right to be free from discrimination in the work place.

And here, 180 days have passed since each of the plaintiffs have filed a formal complaint, and the courts are open to them. The EEOC is open to them. And there is no legal or practical impediment

from them going forward to bring whatever complaints they have to the Court or the EEOC.

The last time, at the preliminary injunction hearing, we waived any exhaustion argument with respect to the four plaintiffs who had problems with the particular counselor.

Here, the agency has acknowledged that there was a problem with a particular EEO counselor, a contract counselor who is no longer on board with the agency, so that the EE process now is functioning in a fully appropriate fashion.

Again, the courts are open, the EEOC is open. To the extend that counsel for the plaintiff represented in the earlier hearing that perhaps obtaining a lawyer was somehow an impediment, certainly lots of pro se litigants go to the EEOC and appear before ALJs in a more informal setting and are fully able to vindicate and protect their rights.

Now, with respect to this constitutionally based cause of action, citing the Fifth Amendment, the case law seems to be fairly uniform, on two points, that for federal employees Title 7 is an exclusive remedy, and there is no more broad constitutionally based

right in this area. Title 7 for federal employees is the exclusive right. And this, of course, is the meaning of Brown versus USA, the long-standing case.

Here, I would just suggest that the plaintiffs really have presented no precedent in support of their position, and they really not even identified a constitutionally protected interest that might even give rise to such a cause of action. Because the right here to be free of discrimination is fully protected by the statute.

Finally, they haven't really demonstrated any need for a new cause of action, because again the de novo right under Title 7 fully protects their rights to go forward. And again, the statute is fully, fully adequate as a remedy, and protects the right to be free from discrimination, as well as giving them a right to money damages.

In those circumstances, I don't believe there is any need, nor can there be demonstrated, a need for a constitutionally based cause of action.

In conclusion, we urge the Court to follow the long line of precedent finding Title 7 to be the exclusive remedy, fully adequate to

protect the rights of federal employees to be free of discrimination in the work place.

Thank you.

THE COURT: All right.

Mr. Bell?

ATTORNEY BELL: Thank you, your Honor.

ARGUMENT BY THE PLAINTIFFS

ATTORNEY BELL: Your Honor, I am here this morning primarily because a motion to dismiss has been filed. And while I am prepared to go through in great detail on the constitutional question, I think the motion to dismiss as submitted makes the case for plaintiffs in having it denied.

The defendants, in essence, have admitted the allegations in the complaint. And the allegations in the complaint are very serious allegations.

The allegations in the complaints are that the defendants have not maintained or followed the duty that is imposed upon it to have an

EEO process available for my clients who are present in court this morning.

This is something that cannot be remedied by Title 7. Title 7, if you pursued an individual complaint in Court, will allow them to prove whether or not there had been discrimination or not, if there is a basis to rely upon for doing that.

But since the government has admitted that it has destroyed documents, it has intimidated witnesses, it has intimidated counselors, and is making the argument that the counselor who was, in fact, there doing her duty as required by law, is the basis for why the system broke down, is something that is inconsistent withe he record as we have presented it.

The record as we have presented it is that it wasn't the counselor, the EEO counselor, that caused the system to break down. They system has broken down because the government, in this particular agency, is ignoring the law, that this particular agency is ignoring the Constitution.

In the papers filed by the defendants, they are basically telling this Court that because they are ignoring the law and that they are

violating these women's right, that there is nothing you can do about it.

The - - in essence, they are basically saying - -

THE COURT: Did any of these - -

ATTORNEY BELL: - - that there is nothing under the Constitution that will allow you to stop them from destroying the EEO process that Congress put in place, that EEOC put in place.

THE COURT: Did any of these plaintiffs file their Title 7 claims in court?

ATTORNEY BELL: None of them have filed claim in court, because they haven't had their claims investigated by the agency.

THE COURT: All right. Have 180 days passed?

ATTORNEY BELL: A hundred and eighty days have passed for some, yes.

THE COURT: So there is no impediment to their proceeding in court, is there?

ATTORNEY BELL: On the constitutional claim, there would be. Going to court on the Title 7 doesn't remedy the constitutional

problem that we are presenting to the court, and it's the constitutional problem that we are asking for a remedy.

It's not the Title 7 underlying claim. I do not represent them on the underlying Title 7 claim. I represent them only on the constitutional claim that is being presented.

THE COURT: Do they intend to file Title 7 claims?

ATTORNEY BELL: Your Honor, they would like to file a Title 7 claim based upon a record that was develop in the agency through investigation. But the evidence - -

THE COURT: The record doesn't play a role. It's de novo in court.

ATTORNEY BELL: It's not de novo, your Honor, if the record have been destroyed. It's no - -

THE COURT: You missed my point. It is de novo in the courts for a Title 7 claim.

In other words, if there is a finding of discrimination, it doesn't get presented in court. If there is a finding of no discrimination, it's a de novo reviews of the claim of discrimination.

ATTORNEY BELL: That's for Title 7, your Honor, but not for the constitutional claim they are presenting.

THE COURT: I am asking you, do they intend to file a Title 7 claim?

ATTORNEY BELL: They intend to file a relief under Title 7, and once they can get the facts and evidence that exist in the agency, that the agency has withheld.

All we are asking the Court to do today is give - -

THE COURT: Well, of course, you get discovery in Title 7 and you get all agency documents.

ATTORNEY BELL: But your Honor, a case in Federal Court is limited as to what you can proceed to get.

THE COURT: It's only limited by the Federal Rules of Civil Procedure, and the discovery is exceptionally broad.

ATTORNEY BELL: Even if - -

THE COURT: It's limited only by what's relevant and not privileged.

ATTORNEY BELL: Yes.

THE COURT: If it's relevant and not privileged, it's discoverable.

ATTORNEY BELL: It's discoverable in the context of Title 7, but not in the context of the constitutional issues that these women present. The constitutional issues that they present cannot be remedied under Title 7.

THE COURT: All right. Go ahead, sir.

ATTORNEY BELL: Your Honor, if the government's argument is correct, that they have done all of the things that are set forth in the complaint, and that they are continuing, even as we speak today, to now propose to take retaliatory action against these women by proposing to remove them from the government, taking their responsibilities from them, removing them from the work sites in which they work, taking retaliatory action while we are proceeding in court today, we are trying to stop this.

Coming to court after they have been fired, coming to court after they have had nervous breakdowns, is not going to remedy that.

What we are asking the Court to do now is similar to what the Court did in the Passman case, where the Court looked at what was

going on and said, "I can, in fact, do something about it. I have the authority to do something about it."

We are asking the same thing that happened in the Marlboro versus Madison case. We can, in fact, remedy the situation. And this is clear from the cases, your Honor, that we have cited involving the Watergate era, when the Court stepped in and said the Executive Branch cannot operate outside of their constitutional order.

Coming into court for a Title 7 claim is going to be limited to the remedy of Title 7. It's not going to do anything to fix the broken system that has now destroyed evidence that they would need in their Title 7 case.

The only way we can deal with that, your Honor, is through this process right now. This, to a certain extent, is not really as novel as one might think. All we are asking the Court to do now is to look at the special circumstances of this case. There is a law which requires an EEO process. The agency admits that there is such a law.

These women are entitled to benefit from that EEO process before they get to court. The agency admits that. There is no other remedy that's going to give them an EEO process.

Coming to court gives them the right to proceed in a more expensive, a more time-consuming process that cannot address the constitutional issues that we are raising here.

This is the only forum where they can bring to the Court, that they cannot win a Title 7 case when the agency is destroying documents, destroying their lives and forcing them out of the agency based on discrimination. This Court, after a fully-developed record, would consider the admissions that they have made, and then make the decision whether or not this case should go forward. We are not asking the Court today to reach the constitutional question.

All we are asking the Court to do is to give us the opportunity to show that everything that we have set forth in the complaint, and that the agency now admits is true, and that will allow us to have evidence so that when they go into court on the individual claims, to present a fully-developed record on the Title 7. They will not have that opportunity going straight into court under Title 7, your Honor.

THE COURT: All right.

Mr. Peabody?

ARGUMENT BY THE DEFENDANT

ATTORNEY PEABODY: Your Honor, just briefly, obviously when you file a motion to dismiss, the allegations in the complaint are taken to be true for the purposes of testing the adequacy of the complaint. And that's obviously what's going on here. And I would suggest that plaintiffs' representations of these defects in the EEO process are grossly exaggerated.

But in any event, if any of those facts are true, they of course would be evidence, perhaps, of discrimination in a de novo Title 7 case that each of these plaintiff is able to bring.

I think the fundamental fallacy of the plaintiff's approach is that there is simply no constitutional right to a perfectly-run EEO process. It's a process. I don't know that there is any precedent that raises, to constitutional dimension, process, when the actual right is not affected in any way, as here. The de novo review is fully adequate.

Thank you.

THE COURT: All right. The Court will take a ten-minute recess to consider this matter. We will reconvene at 11:25.

(Court recessed at 11:10 a.m.)

(Court called to order at 11:45 a.m.)

THE COURT: The matter is before the Court on a motion to dismiss. And in connection with the motion to dismiss, of course, the allegations of the complaint are assumed to be true, including the central allegation, which is, of course, that the NAVC internal EEO program is dysfunctional and discriminated against the plaintiffs.

The argument that the plaintiff makes is a novel argument. The Court has found no authority that anticipates it. It is that the plaintiffs, in effect, have substantive constitutional rights under the Equal Protection Clause, the Fifth Amendment, and under the First Amendment.

There is an allegation there, as well, to an EEO process in NAVC that functions appropriately. This one, say the plaintiffs in their complaint, has broken down. There are seven plaintiffs who have made that allegation.

The arguments were helpful. It is a novel and, I think, a fairly clever argument, but in the Court's view there is no cause of action

under the First or Fifth Amendment to an EEO process that functions properly.

In the Court's view, the plaintiffs, of course, have a right not to be discriminated against under the Fifth Amendment, and that right has been implemented by Congress in Title 7 of the Civil Rights Act of 1964.

The plaintiff's remedy, in the Court's view, is under that statute.

Also, under the Age Discrimination, or Age Discrimination and Employment Act, they have a remedy there as well, and under the Rehabilitation Act, perhaps.

In any event, under each of those statutes the plaintiffs may file a suit in Federal Court and receive de novo consideration.

In connection with that suit, as I indicated in the course of my questioning, they are entitled to discovery. If documents have been destroyed, if persons have behaved inappropriately in connection with that, all of that may be discovered, all of that may be put on the record, people may be deposed; and those actions may be either further

evidence of discrimination, or it may be retaliation, which plaintiffs can also complain of.

In the Court's view, that remedy under the discrimination statutes is the exclusive remedy in these circumstances. There is no extra-constitutional remedy that would have the Court take over or monitor or supervise any EEO process.

There are occasions in extreme circumstances where courts have assumed supervision of prison systems and school systems. There has always been some dispute about the appropriateness of that. I assume that it's appropriate in some circumstances.

In this case, in the Court's view, it isn't. There is no remedy as alleged by the plaintiffs. I think the complaint fails to state a claim upon which relief can be granted.

I don't rule on the basis that it would be inappropriate. I wouldn't reach that issue until I - - unless I found that there was a cause of action and found that there was a cause of action and found that there was a violation.

The Court assumes, in reaching its conclusion, that there have been significant lapses in NAVC's EEO administrative process, and

assumes that there plaintiffs were not treated appropriately, and that documents were destroyed. All of that is assumed.

What the Court concludes is that the remedy for that lies not in a separate constitutional cause of action requesting that a special master be appointed, or that the Court supervise or take over the process, but rather, through suits under the discrimination statutes, where this material can be discovered and spread before the Court and shown as evidence in support of discrimination or retaliation, that there is nothing to prevent the plaintiffs from filing their Title 7 suits, or other suits under other discrimination statutes.

So, the Court will grant the motion to dismiss, enter the order accordingly, and of course it is a novel cause of action, and plaintiffs have the absolute right to proceed to appeal this matter to the Court of Appeals for the Fourth Circuit.

I would note parenthetically that I consider that assuming court supervision of an agency's operations, even a part of an agency's operations, raises serious questions about the competency of courts under the Constitution and the separation of powers to do it.

But as I said, I don't reach that issue, because more fundamentally I find that the plaintiffs cannot state a cause of action under the Constitution based on defects in an agency process.

I thank counsel for their cooperation. The Court will enter an order.

Call the next matter, please.

ATTORNEY BELL: Your Honor, may I be heard just one minute?

THE COURT: Yes.

ATTORNEY BELL: Your Honor, may I request that in your order, you would - - since the government has admitted to the destruction of documents, and that process is ongoing, that you ask them to cease that process and not take retaliatory action against these individuals before they take additional action?

THE COURT: You misunderstand, Mr. Bell. They don't admit that that's a fact. They admit that for the purpose of this Court's ruling on a motion to dismiss. Is that right, Mr. Peabody?

ATTORNEY PEABODY: Yes, sir.

THE COURT: I would be amazed - - and in fact, the sooner your file a Title 7 action on behalf of one of these plaintiffs, if there is ongoing destruction of documents, that's the forum in which it would be brought out, because that would be evidence of discrimination and retaliation.

Wouldn't it, Mr. Peabody?

ATTORNEY PEABODY: Perhaps, yes, your honor.

THE COURT: It would be fairly devastating evidence of that, if someone that they contend is discriminating against them is destroying documents; is that right?

ATTORNEY PEABODY: Yes, if true.

THE COURT: So your request is denied. I will enter an order accordingly.

Call the next matter.

(Court recessed at 11:53 a.m. in Chapman v. Danzig)

CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions hearing in the case of ARETHA CHAPMAN, et al., v. RICHARD DANZIG, et al.

I further certify that I was authorized and did report by stenotype the proceedings in said motions hearing, and that the foregoing pages, numbered 1 to 20, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 23rd day of March, 2000.

[signed]
Michael A. Rodriquez, RPR/CM/RMR
Official Court Reporter